



PRELIMINARY DRAFT
No. 3244

PREPARED BY
LEGISLATIVE SERVICES AGENCY
2011 GENERAL ASSEMBLY

DIGEST

Citations Affected: IC 30-4-2.1; IC 30-4-3-35.

Synopsis: Trust construction. Defines "discretionary interest". Specifies that real property transferred to matrimonial trusts for estate planning purposes continues to enjoy the ownership protection of real property owned as joint tenants by the entirety. Provides that the terms of a matrimonial trust may restrict the transfer of matrimonial property. Specifies when property continues to be matrimonial property. Specifies when claims against the property are barred. Specifies when matrimonial trusts cease to be matrimonial trusts.

Effective: Upon passage.



A BILL FOR AN ACT to amend the Indiana Code concerning trusts and fiduciaries.

Be it enacted by the General Assembly of the State of Indiana:

SECTION 1. IC 30-4-2.1-14, AS ADDED BY P.L.6-2010, SECTION 14, IS AMENDED TO READ AS FOLLOWS: Sec. 14. (a) The following rules apply only to discretionary interests **(as defined in IC 30-4-2.1-14.5):**

(1) A discretionary interest is a mere expectancy that is neither a property interest nor an enforceable right.

(2) A creditor may not:

(A) require a trustee to exercise the trustee's discretion to make a distribution; or

(B) cause a court to foreclose a discretionary interest.

(3) A court may review a trustee's distribution discretion only if the trustee acts dishonestly or with an improper motive.

(b) Words such as sole, absolute, uncontrolled, or unfettered discretion dispense with the trustee acting reasonably.

(c) Absent express language to the contrary, if the distribution language in a discretionary interest permits unequal distributions between beneficiaries or distributions to the exclusion of other beneficiaries, a trustee may, in the trustee's discretion, distribute all of the accumulated, accrued, or undistributed income and principal to one (1) beneficiary to the exclusion of the other beneficiaries.

(d) Regardless of whether a beneficiary has any outstanding creditors, a trustee of a discretionary interest may directly pay any expense on behalf of the beneficiary and may exhaust the income and principal of the trust for the benefit of the beneficiary. A trustee is not liable to a creditor for paying the expenses of a beneficiary who holds a discretionary interest.

SECTION 2. IC 30-4-2.1-14.5 IS ADDED TO THE INDIANA CODE AS A NEW SECTION TO READ AS FOLLOWS [EFFECTIVE UPON PASSAGE]: **Sec. 14.5. (a) As used in this section and section 14 of this chapter, "discretionary interest" refers to any interest over which the trustee has any discretion to**



1 make or withhold a distribution.

2 (b) A discretionary interest may be evidenced by permissive
3 language such as "may make distributions" or may be evidenced
4 by mandatory distribution language that is negated by the
5 discretionary language of the trust such as "the trustee shall make
6 distributions in the trustee's sole and absolute discretion".

7 (c) An interest that includes distribution language that appears
8 mandatory but is subsequently qualified by discretionary
9 distribution language is considered a discretionary interest.

10 (d) Trust provisions that create discretionary interests include
11 the following examples:

12 (1) "The trustee may, in the trustee's sole and absolute
13 discretion, make distributions for health, education,
14 maintenance, and support."

15 (2) "The trustee shall, in the trustee's sole and absolute
16 discretion, make distributions for health, education,
17 maintenance, and support."

18 (3) "The trustee may make distributions for health, education,
19 maintenance, and support."

20 (4) "The trustee shall make distributions for health,
21 education, maintenance, and support. The trustee may
22 exclude any beneficiary or make unequal distributions among
23 the beneficiaries."

24 (5) "The trustee may make distributions for health, education,
25 maintenance, support, comfort, and general welfare."

26 SECTION 3. IC 30-4-3-35, AS ADDED BY P.L.6-2010, SECTION
27 18, IS AMENDED TO READ AS FOLLOWS [EFFECTIVE UPON
28 PASSAGE]: Sec. 35. (a) This section is intended to ensure that if
29 real property is transferred to one (1) or more revocable trusts
30 created by a husband and wife for estate planning purposes, the
31 husband and wife will enjoy the real estate ownership protections
32 that they would otherwise enjoy if they owned that real property
33 in an estate by the entirety including an estate by the entirety
34 created under IC 32-17-3-1.

35 ~~(a)~~ (b) As used in this section, "joint matrimonial trust" means a
36 single inter vivos trust established under this section by settlors who
37 are related as husband and wife.

38 ~~(b)~~ (c) As used in this section, "matrimonial property" means real
39 property that:

40 (1) is subject to a written election to treat the property as
41 matrimonial property under this section; and

42 (2) is owned by a matrimonial trust.

43 ~~(c)~~ (d) As used in this section, "matrimonial trust" means a trust
44 established under this section to own matrimonial property.

45 ~~(d)~~ (e) As used in this section, "separate matrimonial trust" means
46 a separate trust that is also a matrimonial trust.



~~(e)~~ **(f)** As used in this section, "separate trust" means a trust established by one (1) individual.

~~(f)~~ **(g)** A matrimonial trust may be established:

- (1) jointly by a husband and wife; or
- (2) in two (2) or more separate trusts.

~~(g)~~ **(h)** A husband and wife may elect to treat real property as matrimonial property with a written statement of the election:

- (1) in an instrument or instruments conveying the real property to a matrimonial trust or trusts; or
- (2) in a separate writing that must be recorded in the county where the real property is situated and indexed in the records of the county recorder's office to the instrument or instruments that convey the real property to a matrimonial trust or trusts.

~~(h)~~ **(i)** A guardian of a husband ~~and~~ **or** wife may make an election under this section:

- (1) without the approval of the court if the guardian has unlimited powers under IC 29-3-8-4; and
- (2) with the approval of the court in all other cases.

~~(i)~~ **(j)** An attorney in fact of a husband and wife may ~~make~~ **join in the making of** an election under this section under the powers conferred upon the attorney in fact by IC 30-5-5-2 if the power of attorney is recorded in the county where the real property is situated and indexed in the records of the county recorder's office to the instrument or instruments that convey the real property to a matrimonial trust or trusts.

~~(j)~~ **(k)** **The terms of a separate matrimonial trust or a joint matrimonial trust may (but are not required to) restrict the sale or transfer of the matrimonial property for:**

- (1) the lifetime of the settlor who dies first;**
- (2) the lifetime of the surviving settlor; or**
- (3) another defined time period.**

(l) An interest in matrimonial property is not severable during the marriage of the husband and wife unless:

- (1) both the husband and wife join in the severance in writing; or
- (2) a third party owns and forecloses a mortgage or other lien against the interests of both the husband and wife in the matrimonial property.

~~(k)~~ **(m)** Notwithstanding any other provision of this section, the legal rights of a lienholder that exist at the time of an election to treat the real property subject to the lien as matrimonial property may not be subject to a severance described in subsection ~~(j)~~ **(l)** without the lienholder's written consent.

~~(l)~~ **A matrimonial trust established by an individual (n) To the extent that a matrimonial trust continues to be a matrimonial trust after the death of the a settlor (as provided by subsections (o) and (p):**



(1) real property held or owned in a separate trust and for which an earlier election was made under this section, continues to be marital property; and

(2) an unsecured creditor or judgment lien creditor who has a claim only against the deceased settlor but not against the surviving settlor cannot enforce that claim against the deceased settlor's interest or the surviving settlor's interest in the marital property.

(o) Marital property held in a separate marital trust or in a joint marital trust continues to be marital property after the death of one (1) settlor:

(1) if the settlors reserved a life estate in the marital property for each settlor when they conveyed the marital property to the marital trust or trusts; or

(2) if the deceased settlor's separate trust provides to the surviving spouse settlor:

(1) (A) a life estate;

(2) (B) an interest that qualifies for a deduction from the gross estate of the decedent under Section 2056 of the Internal Revenue Code regardless of whether an election is made to qualify the interest for the deduction; or

(3) (C) in some respect the current right to occupy or receive rent, royalties, or other kinds of income with respect to the marital property.

(m) (p) A separate marital trust established by a deceased settlor ceases to be a marital trust upon the termination of payments to the surviving spouse settlor as a result of the surviving spouse's death or as a result of the surviving spouse's valid disclaimer of all interests in the separate marital property held in the deceased settlor's trust.

(n) (q) A joint separate marital trust ceases established by a settlor who remains alive continues to be a marital trust upon the death of one (1) of the settlors during that settlor's remaining lifetime, so long as the settlor retains the right to use or occupy marital property held in the settlor's separate trust.

(o) (r) A marital trust ceases to be a marital trust upon the dissolution of the marriage of the settlors.

(p) (s) A husband and wife may revoke a marital trust by together executing a writing expressing the revocation.

SECTION 4. An emergency is declared for this act.

